Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
VOICESTREAM WIRELESS CORPORATION, and	)	
	)	
POWERTEL, INC.,	)	
	)	
Transferors,	)	
	)	
and	)	IB Docket No. 00-187
	)	
DEUTSCHE TELEKOM AG,	)	
	)	
Transferee,	)	
	)	
Applications for Consent to Transfer of Control	)	

REPLY IN SUPPORT OF
<u>APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL</u>

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proposed transactions do *not* pose a "very high risk" to competition in this country,[38] and others implicitly make such a concession by openly asking the Commission to disregard that standard.[39] The Commission should reject this invitation to contravene its own orders.[40]

1. DT Could Not Improperly Cross-Subsidize VoiceStream's Wireless Operations in the United States.

There is nothing at all to the notion that DT could improperly cross-subsidize VoiceStream's wireless operations in the United States. As an initial matter, a postmerger VoiceStream plainly could not drive its much-larger rivals — including Verizon, AT&T, Cingular, and Sprint — out of the U.S. market and thereby attain a dominant position. Yet, without doing so, VoiceStream could not recoup the losses that necessarily attend predatory pricing and therefore could not profit from such a scheme. The competitiveness of the German market (*see* Appendix A) also would stand in the way of any attempt to increase DT's rates in Germany; and absent a rate increase, there could be no improper cross-subsidy. Statutory and regulatory safeguards, as well as the geographic and operational separation between DT's operations in Germany and VoiceStream's U.S. wireless operations, further make clear that commenters alleging a threat of improper "cross-subsidization" cannot possibly demonstrate any credible risk to competition, much less the "very high risk" required under the Commission's open-entry standard.[41]

38/ *See* Comments of Novaxess at 3.

39/ *See* Comments of QSC at 25 (arguing that DT should be treated as if it were based in a non-WTO country); Comments of GTS at 6 (arguing that Commission should ignore strong presumption favoring entry adopted in *Foreign Participation Order*).

40/ *See Reuters Ltd. v. FCC,* 781 F.2d 946 (D.C. Cir. 1996) ("It is elementary that an agency must adhere to its own rules and regulations.").

41/ *Foreign Participation Order*, 12 FCC Rcd at 23913-14, 23922 ¶¶ 51, 69.

a. The Competitiveness of the U.S. and German Markets Precludes Any Improper Cross-Subsidy Scheme, as Does Retail Rate Regulation in Germany.

Senator Hollings and the German Competitors assert, without supporting facts or analysis, that a combined VoiceStream-DT would threaten domestic wireless competition through a predatory-pricing scheme financed by monopoly rents from DT's operations in Germany. These claims do not withstand minimal scrutiny. As economist Gregory Sidak states in the attached declaration, DT would have no incentive to engage in an improper cross-subsidy scheme, because the competitive U.S. wireless market simply is not vulnerable to a predatory-pricing threat.[42] Any of the well-heeled wireless incumbents in the U.S. market could incur losses in anticipation of future profits, just as DT theoretically could. These carriers had a combined market capitalization of nearly $500 billion as of September 2000, which would enable them to withstand any one competitor's below-cost pricing.[43] VoiceStream's low market share of only three percent would make it all the more implausible that VoiceStream could "capture a commanding market share quickly enough to make a campaign of predatory losses remunerative."[44] Even if VoiceStream could somehow drive its much-larger competitors from the market, their spectrum and facilities would remain,[45] and new entrants would appear as soon as VoiceStream raised prices to recoup earlier losses.[46] VoiceStream, of course, could not

42/ *See* Declaration of J. Gregory Sidak ("*Sidak Decl.*") at 16-17 (attached as Appendix B).

43/ *See id.* at 17.

44/ *Id.*

45/ Indeed, the services of VoiceStream's competitors would remain on the market during their reorganization.

46/ *See Sidak Decl.* at 19.

obtain spectrum owned by any failed competitor without the Commission's consent, and, in the case of a merger or acquisition, antitrust review by DOJ or the Federal Trade Commission.[47]

Even if DT tried to raise its rates in Germany for the purpose of launching an ill-advised cross-subsidy scheme to fund below-cost prices in the United States, competition in Germany would prevent such an effort. As shown in the Applications and in Appendix A to this Reply, nearly all of the German telecommunications market now is subject to substantial price competition as a result of broad-based new entry by companies including U.S. providers.[48] For example, by November 1999 competitive long distance carriers already had captured 40 percent of the German domestic long distance market and approximately 48 percent of the market for international long distance,[49] leading to rate declines of as much as 85 percent (to as little as 2 cents per minute) in the domestic market, and 93 percent in the international market.[50] Indeed, the extent of competitive entry indicates that entrants do not fear cross-subsidization between services offered in the German telecommunications market, and it is even less probable that DT

47/ Unlike the German Competitors, which could not be harmed by any hypothesized predatory pricing scheme (in fact, they would *benefit* if DT's rates in Germany were inflated to enable below-cost pricing in the United States), VoiceStream's U.S. wireless competitors obviously do not take this cross-subsidy argument seriously, because none has filed comments in this proceeding.

48/ *See, e.g.*, Federal Republic of Germany, Regulatory Authority for Telecommunications and Posts, *Mid-Year Report 2000, available at* www.regtp.de/en/market/start/fs_15.html (discussing competitiveness of wireless, long distance, and other markets); Federal Republic of Germany, Regulatory Authority for Telecommunications and Posts, *Annual Report 1999* (same); Klaus-Dieter Scheurle, Pres., Regulatory Authority for Telecomms. and Posts, *Competition, Regulation and the Future of Regulation in Germany*, Address at J.F. Kennedy School of Gov't, Harvard Univ., Boston, at 1 (April 10, 2000), *available at* www.regtp.de/en/aktuelles/reden/01774/index.html (discussing long distance competition) (all cited in VoiceStream-DT App. at 10-16). *See also* Appendix A, *infra*.

49/ *See* VoiceStream-DT App. at 14.

50/ *See id.*

could use services provided in Germany to cross-subsidize services outside its home market.[51] If DT were to inflate its rates in Germany, it would lose market share to ever-stronger competitors, and the lost revenue would more than offset any gains in the U.S. wireless market.[52] Gregory Sidak explains:

> The large number of companies (especially from the United States) that have entered, and continue to enter, nearly all segments of the German telecommunication market ensure that prices in Germany are driven towards competitive levels. That outcome in turn ensures that Deutsche Telekom cannot earn supracompetitive returns with which to fund a predatory strategy in another country.[53]

While the local service market in Germany is not yet as competitive as that country's markets for mobile telephony, long-distance, and other services, DT does not have the ability to raise prices for local telephony in Germany in order to cross-subsidize other services in any location. Accelerating competition, particularly in the business market, is putting pressure on DT's retail rates.[54] In any event, comprehensive rate regulation precludes DT from increasing its local rates to supracompetitive levels.[55] DT is subject to strict sector-specific regulation of

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51/ *See Sidak Decl.* at 20.

52/ *Cf.* Teligen, *Study on Market Entry Issues in EU Telecommunications Markets After 1st January 1998: A Report for the European Commission*, at 2 (July 26, 2000) ("[When] DT left the prices of long distance and international calls high [that gave] new entrants the economic incentive to enter the market.").

53/ *See Sidak Decl.* at 27.

54/ For example, new entrants are beginning significant deployment of wireless local loop technology; in 1998 and 1999, RegTP allocated wireless local loop frequencies to 18 operators, many of which were U.S. companies. *See RegTP Mid-Year Report 2000* at 9-10. Many business customers now have a choice of two or more carriers, and consumers in more than half of the 83 largest German cities do as well. *See id.* at 12.

55/ *See* German Telecommunications Act §§ 24, 25, 27, 29.

retail tariffs.[56] Those tariffs must reflect the costs of efficient service provision based on the long-run incremental costs of providing a particular service, and the tariffs are subject to thorough scrutiny by RegTP.[57] In particular, RegTP prohibits these tariffs from containing any surcharges that result from the provider's market position, or discriminating among customers for the same or similar services in a market sector; rather, any surcharges, discounts, or discriminatory features must be objectively justified.[58] In short, there is simply no evidence — and certainly none adduced by commenters — that DT has any ability to increase retail local service prices to fund cross-subsidies.

b. *Statutory and Regulatory Safeguards Further Ensure That the Proposed Transactions Will Not Adversely Affect Competition in the United States.*

Other statutory and regulatory safeguards also would prevent DT from effecting improper cross-subsidies. First, even assuming for the sake of argument that cost-shifting were possible notwithstanding retail and wholesale rate regulation (which it is not), accounting and other safeguards would enable German, E.U., and U.S. regulators to detect and respond to any anticompetitive behavior. The German Telecommunications Act includes various measures that require transparency and prevent abuse of a dominant market position.[59] The also E.U. closely

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56/ DT also is subject to strict cost-based regulation of the services offered to competitors on a wholesale basis (*e.g.*, interconnection, local loop unbundling).

57/ *See* German Telecommunications Act § 24; Telekommunikations-Entgeltregulierungsverordnung (Telecommunications Rates Regulation) § 3.

58/ *See* German Telecommunications Act § 24.

59/ *See id.* §14 (requiring transparent financial relations between and among services for dominant providers); §§ 29-30 (regulating rates); § 33 (preventing abuse of dominant position); § 35 (requiring dominant providers to grant competitive access to their networks). *See also* Christoph Engel, *The Path to Competition for Telecommunications in Germany*, in COMPETITION AND REGULATION IN TELECOMMUNICATIONS: EXAMINING GERMANY AND AMERICA (J. Gregory Sidak, ed., 2000) (describing German safeguards against cross-subsidization).

monitors competition and the performance of regulators in Germany and other member states. Pursuant to its Full Competition Directive of 1996, and other liberalization and harmonization directives in the telecommunications sector, the European Commission compiles exhaustive annual reports, and, where necessary, institutes proceedings to enforce its rules and ensure the continued development of competition and liberalized markets. As of the publication of the European Commission's *Sixth Implementation Report* in October 2000, there were 67 "infringement proceedings" underway against the various Member States.[60/]

Second, DT's financial imperatives and fiduciary duties militate against any counterproductive cross-subsidy scheme, because, as shown above, such a scheme could not succeed in enhancing DT's profits. DT's partial government ownership does not relieve it of the objective of profit maximization. Because DT is a publicly traded firm that must compete with other firms for capital, it cannot engage in a futile effort to set predatory prices that do not maximize profits.[61/] Any attempt to do so would be punished in the financial markets. Similarly, under German corporate law, DT's executives and board members are bound by a duty to preserve the long-term profitability of the company.[62/] DT also owes a fiduciary duty of loyalty to its minority shareholders, who have purchased ADRs on the New York Stock Exchange or elsewhere.[63/] Thus, if DT's management attempted to support below-cost prices in the U.S.

60/ European Commission, *Sixth Report on the Implementation of the Telecommunications Regulatory Package*, at 5 (Dec. 7, 2000) (noting 16 proceedings under the liberalization directives and 51 under the harmonization directives).

61/ *See Sidak Decl.* at 19.

62/ *See* German Stock Corporation Act §§ 76, 93.

63/ *See, e.g.*, *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464 (Cal. 1969).

market, thereby deviating from profit-maximizing behavior, DT might expose itself to liability under American corporate law, and possibly the laws of other nations.

c. *Separation of DT's Operations in Germany and VoiceStream's Wireless Operations Also Guards Against Improper Cross-Subsidization.*

The separation between DT and VoiceStream will serve as a further bulwark against any theoretical risk of improper cross-subsidization or other anticompetitive behavior. The fact that DT and VoiceStream operate in different geographic markets is pivotal. The Commission has recognized that geographic separation "mitigates the potential for undetected improper allocation of costs" between an ILEC and its wireless affiliate.[64] For that reason, the Commission does not impose separation requirements on an incumbent LEC's "out-of-region" wireless operations; only a wireless service that substantially overlaps with a carrier's local service area must be provided through a separate affiliate.[65] VoiceStream's wireless operations in the United States are located on a different continent from DT's local wireline facilities. Therefore, if DT were subject to the Commission's rules regarding incumbent LECs' CMRS affiliates, VoiceStream's geographic separation from DT would be deemed sufficient to prevent improper cross-subsidization or other anticompetitive practices.

DT and VoiceStream nevertheless will have two degrees of separation that further safeguard against anticompetitive conduct. First, DT and T-Mobile International AG ("T-Mobile"), the holding company that will eventually control VoiceStream after the mergers, operate as separate entities. DT and T-Mobile have separate management boards and facilities.

64/ *See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, 15693 ¶ 39 (1997) ("*CMRS Safeguards Order*").

65/ *See* 47 C.F.R. § 20.20(e); *CMRS Safeguards Order*, 12 FCC Rcd at 15673-74, 15694-96 ¶¶ 5, 42-43.

Moreover, DT and T-Mobile enter into written contracts to prescribe the terms of their relationship. For instance, DT and T-Mobile have entered into a licensing agreement under which T-Mobile must pay DT an annual license fee and must comply with fixed guidelines at the risk of financial penalties for noncompliance. T-Mobile contracts with a separate DT subsidiary, T-Nova Deutsche Telekom Innovationsgesellschaft mbH, for research and development work, but T-Mobile also is free to, and does, utilize other research and development.

Second, within T-Mobile, VoiceStream and T-Mobile's existing operating subsidiaries will be separate entities. Several other wireless subsidiaries that DT owns through T-Mobile, including One-2-One in the United Kingdom and max.mobil in Austria, maintain separate corporate identities, keep separate books of account, and have their own officers and employees. Apart from using DT's international network for inter-country traffic, those wireless subsidiaries have no substantial overlap with DT or with each other. Transactions between and among DT, its wireless subsidiaries, and its other subsidiaries (such as IT or systems solutions companies that may provide services to wireless subsidiaries) are negotiated and conducted on a separate contractual basis. VoiceStream's relationship with DT, T-Mobile, and other DT subsidiaries is expected to involve the same separation.

2. *DT Could Not Leverage Any "Bottleneck" Control of Local German Wireline Facilities To Undermine Competition in the U.S. Wireless Market.*

The German Competitors and Senator Hollings also assert — again without any factual or analytical support — that DT will be able to leverage its position in wireline local telecommunications markets in Germany to impede competition in the U.S. wireless

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Transferee.	)	

DECLARATION OF J. GREGORY SIDAK

3. Deutsche Telekom Has No Statutory Privileges or Immunities

34. In addition to the fact that it does not have preferential access to capital, Deutsche Telekom is a private law stock corporation subject to applicable German federal law such as the German Stock Corporation Act and German tax laws.[10] Thus, Deutsche Telekom has the same rights and responsibilities (for example, with regard to taxation) as does any other private enterprise; nor does Deutsche Telekom enjoy tax benefits or any kind of preferential tax treatment.[11] Equally, Deutsche Telekom does not receive state aid, as this would clearly violate European Union legislation prohibiting state aids that would distort competition.[12]

B. Deutsche Telekom Cannot Engage in Predatory Pricing and Cross-Subsidization in the U.S. Wireless Telecommunications Market

35. A critical assumption of the cross-subsidy argument is that Deutsche Telekom would use cross-subsidies to obtain a temporary competitive advantage over its rivals in the U.S. wireless market, with the objective of eliminating competitors. That view implies that Deutsche Telekom would engage in behavior resembling predatory pricing, which is said to occur when a firm incurs a loss with the intention of eliminating rivals and later raising prices to recoup earnings after the rivals have exited the market.[13] That argument has been widely discredited. The published economics literature and the Supreme Court generally agree that predatory pricing is unlikely to succeed because (1) there is little guarantee of successful recoupment, (2) rivals can also incur losses in anticipation of future profits, and (3) new entrants will appear if prices are raised after the

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10. *Id.* at 73-74.

11. *Id.*

12. Treaty Establishing the European Community, art. 87, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992), as amended by the Treaty of Amsterdam, Oct. 2, 1997, O.J. (C 340) 173 (1997), [1997] 4 E.U.L.R. ¶ 25,500 (1997).

13. *See, e.g.*, WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 63 (MIT Press & AEI Press 1994); DANIEL F. SPULBER, REGULATION AND MARKETS 475-76 (MIT Press 1989); *see also* JOHN R. LOTT JR., ARE PREDATORY COMMITMENTS CREDIBLE?: WHO SHOULD THE COURTS BELIEVE (University of Chicago Press 1999).

existing competitors have exited the industry.[14] Moreover, it is difficult in practice to distinguish low competitive prices from predatory prices and to distinguish low earnings from predatory losses.[15]

36. In the following sections, I apply the traditional theory on predatory behavior to demonstrate that Deutsche Telekom does not have either the incentive or the opportunity to engage in predatory behavior in the U.S. wireless telecommunications market. The German government's partial ownership of Deutsche Telekom during the remaining period of the company's privatization does not create any special concern in this regard.

1. Deutsche Telekom Does Not Have the Incentive to Engage in Predatory Behavior in the U.S. Wireless Telecommunications Market

37. Deutsche Telekom lacks the incentive to engage in predatory behavior in the U.S. wireless telecommunications market because, for at least four reasons, it could never recoup predatory losses. First, the likelihood of cross-subsidization and predatory pricing grows increasingly implausible when one considers that the U.S. wireless market that Deutsche Telekom would enter through its acquisition of VoiceStream has multiple incumbent suppliers with substantial capacity and enormous financial resources. For example, the combined market capitalization of AT&T Wireless ($39.6 billion), Cingular Wireless (the joint venture between BellSouth Corporation ($79.0 billion) and SBC Communications ($170.5 billion)), Nextel ($17.6

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14. *See* Brooke Group Ltd. *v.* Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-26 (1993); Matsushita Elec. Indus. Co. *v.* Zenith Radio Corp., 475 U.S. 574, 589 (1986); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 144-59 (Free Press, rev. ed. 1993) (Basic Books 1978); YALE BROZEN, CONCENTRATION, MERGERS, AND PUBLIC POLICY 163, 392 (Macmillan Publishing Co. 1982); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 184-96 (University of Chicago Press 1976); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 699, 718 (1975); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

15. BORK, *supra* note 14, at 144-55.

billion), Sprint PCS ($16.8 billion), and Verizon ($135.6 billion) was $482.9 billion as of January 3, 2001.[16]

38. Second, the acquisition of VoiceStream will give Deutsche Telekom only about 3 percent of the wireless telecommunications customers in the United States. Such a low market share as a starting point makes it all the more implausible that Deutsche Telekom could capture a commanding market share quickly enough to make a campaign of predatory losses remunerative. Stated differently, Deutsche Telekom would need to capture a significant share of the U.S. wireless market to make the eventual price increase on "captured" customers profitable.

39. Third, the low average variable costs in the delivery of wireless services further diminishes the prospect that predation would be attempted by Deutsche Telekom or any other firm. Economic rationality will prevent a firm from persistently pricing below average variable cost.[17] When prices do not allow for a competitive level of profit—that is, when total revenues are less than total costs—a firm must confront the prospect of shutting down operations. In particular, the firm should continue to operate in the short run if and only if the loss incurred when the firm stays in business (that is, total costs less total revenues) is less than the loss incurred when the firm shuts down (that is, total costs less total variable costs).[18] Because the majority of the costs in developing a wireless network are fixed, the average variable costs for U.S. wireless carriers are very low relative to their respective prices. Hence, a necessary (but not

16. Information downloaded from Yahoo's web site http://biz.yahoo.com/ at close of trading January 3, 2001.

17. *See, e.g.*, WILLIAM J. BAUMOL & ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICY 216-17 (Dryden Press 7th ed. 1997).

18. Hence, the economic decision to remain in operation can be boiled down to the following simple rule: Remain in operation so long as total variable cost is less than total revenue. Because total cost and total revenue are divisible by quantity produced, the rule can be simplified further: A firm would remain in operation so long as average variable cost were less than price. If that condition were not met, the firm would rationally choose to shut down operations. Stated differently, no rational firm would choose to price below average variable cost if its sole objective were maximizing its own profit.

sufficient) condition for a successful predatory strategy would be that Deutsche Telekom would force prices for wireless telecommunications services to fall significantly.

40. The fourth reason that recoupment is impossible and predation therefore implausible is the durability of spectrum. Spectrum does not wear out and cannot be destroyed. It would therefore be impossible for Deutsche Telekom to restrict industry output of wireless telecommunications services and raise prices above incremental costs during the recoupment phase of the predation scenario. Even in the unlikely event that Deutsche Telekom could drive one of the large wireless incumbents into bankruptcy, the bandwidth capacity of that carrier would remain intact, ready for use during and after reorganization to undercut Deutsche Telekom's noncompetitive prices.[19] It is not plausible that Deutsche Telekom could hoard the spectrum of competitors that it had driven from the market, because the FCC (if not also the federal antitrust authorities) would first have to approve a transfer of the relevant licenses from the failed competitors to Deutsche Telekom. In short, if Deutsche Telekom were to attempt predatory pricing in the U.S. wireless market, it could not expect to recoup its investment in sales made below incremental cost.[20]

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19. The FCC has recognized an analogous argument concerning the durability of fiber-optic transmission capacity. *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Notice of Proposed Rulemaking, CC Dkt. No. 96-149, 11 F.C.C. Rcd. 18,877, 18,943 ¶ 137 (1996) (citing Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 60 (1995); other citations omitted).

20. For similar skepticism of the plausibility of predatory pricing in the U.S. telecommunications market, see PAUL W. MACAVOY, THE FAILURE OF ANTITRUST AND REGULATION TO ESTABLISH COMPETITION IN LONG-DISTANCE TELEPHONE SERVICES 186-90 (MIT Press & AEI Press 1996); Susan Gates, Paul Milgrom & John Roberts, *Deterring Predation in Telecommunications: Are Line-of-Business Restraints Needed?*, 16 MANAGERIAL & DECISION ECON. 427 (1995); Paul S. Brandon & Richard L. Schmalensee, *The Benefits of Releasing the Bell Companies from the Interexchange Restrictions*, 16 MANAGERIAL & DECISION ECON. 349 (1995); Jerry A. Hausman, *Competition in Long-Distance and Telecommunications Markets: Effects of the MFJ*, 16 MANAGERIAL & DECISION ECON. 365 (1995); Kenneth J. Arrow, Dennis W. Carlton & Hal S. Sider, *The Competitive Effects of Line-of-Business Restrictions in Telecommunications*, 16 MANAGERIAL & DECISION ECON. 301 (1995).

41. Because of the inherent durability of spectrum, Deutsche Telekom could never recoup predatory losses incurred in the U.S. mobile telephony market—there would always be competitors in the market. Moreover, the low average variable costs in the delivery of wireless services make it all the more implausible that U.S. carriers would exit the wireless telecommunications market in the face of attempted predation by Deutsche Telekom. Because its expected losses from engaging in predation would outweigh any expected gains, Deutsche Telekom would not have an incentive to engage in predatory behavior.

2. Deutsche Telekom Does Not Have the Opportunity to Engage in Predatory Behavior in the U.S. Wireless Telecommunications Market

42. In addition to lacking the incentive to engage in predation, Deutsche Telekom does not have the *opportunity* to engage in predatory behavior in the U.S. wireless telecommunications market. This is true for two basic reasons. First, Deutsche Telekom is compelled to pursue profit maximization, which is inconsistent with predatory pricing. Second, the German telecommunications market is competitive and therefore denies Deutsche Telekom any reservoir of supracompetitive profits with which it might pay for a strategy of predation in the U.S. wireless telecommunications market.

a. Deutsche Telekom Must Pursue Profit Maximization

43. The partial government ownership of Deutsche Telekom does not relieve the corporation from the objective of profit maximization. Because Deutsche Telekom must compete with other firms for capital, Deutsche Telekom is not able to choose predatory prices (or any other prices) that do not maximize profits.

44. The absence of profit maximization is the critical factor behind the theory that a public enterprise will have a heightened incentive for predatory conduct. But profit maximization necessarily becomes the objective of a firm as soon as it is *at least partly* privatized and listed on

a stock exchange. This insight has critical implications for the competitive significance of the partial government ownership of Deutsche Telekom. It necessarily follows that because Deutsche Telekom is a publicly traded company, it must seek to maximize profit. Plainly, Deutsche Telekom is in the midst of privatization; to ensure successful share offerings in the future, the Kreditanstalt für Wiederaufbau and the German finance ministry have a powerful incentive to see that Deutsche Telekom delivers maximum value to its current shareholders, which is an objective that cannot be reconciled with a strategy of incurring predatory losses in new markets.

b. In Germany, Deutsche Telekom Faces Competitive Telecommunications Markets as Well as Effective and Transparent Regulation

45. The regulatory and competitive conditions of the German wireless and traditional landline telecommunications markets do not provide Deutsche Telekom supracompetitive returns with which to subsidize predatory behavior in the U.S. mobile telephony market. The German telecommunications market was fully liberalized on January 1, 1998. Because there are no foreign ownership restrictions in Germany, many foreign owned companies have entered the market. The level of competition in the German telecommunications market is reflected in the number of licenses and the amount of foreign ownership of those licenses. The German regulatory authority reports that, by the end of June 2000, 305 companies had been granted network or voice telephony licenses.[21] Some 150 companies now offer voice telephony, including more than 50 resellers.[22] At the end of 1999, foreign companies, mostly from North

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21. REGULATORY AUTHORITY FOR TELECOMMUNICATIONS AND POSTS, MID-YEAR REPORT 2000, at 9 (2000) (downloaded from http://www.regtp.de/en/market/start/fs_15.html).
22. *Id.* at 12.

America, held majority stakes in 20 percent of the then-252 licensees, and over 30 percent of the satellite licenses (19 of 59) had been awarded to foreign companies.[23]

46. The pace of telecommunications deregulation in Germany since its landmark legislation in 1996 compares favorably with that in the United States. Table 3 summarizes the regulatory and competitive conditions in Germany and compares them with those in the United States.

TABLE 3: U.S.-GERMAN COMPARISON ON KEY REGULATORY ISSUES IN TELECOMMUNICATIONS, SEPTEMBER 2000

Issue	United States	Germany
Market Entry Conditions		
Foreign Ownership	Foreign ownership of 25% and above of U.S. companies with a radio license requires FCC approval (public interest test).	No foreign ownership restrictions (no public interest test).
License Requirements	FCC section 214 authority required for authorization to provide international basic services (public interest test); dominant carrier regulation for foreign carriers that are dominant in their home markets.	Very liberal licensing regime; no dominant carrier regulation for foreign carriers, no public interest test.
3rd Generation Wireless (3G)	NTIA and the FCC are coordinating on efforts to free up spectrum for third generation services. Their goal is to complete these auctions by September 30, 2002.	RegTP auctioned six licenses in August 2000; no restrictions concerning technology or standards being used.
Intelsat Direct Access	Level III direct access became available to most users in December 1999. All parties obtaining direct access must still pay a 5.58 percent surcharge to COMSAT to compensate it for its costs as Intelsat signatory. Foreign INTELSAT signatories are not permitted to purchase direct access to countries where they control more than 50% of INTELSAT capacity consumed.	Direct access to INTELSAT has been offered since 1995, to foreign and domestic companies alike.

23. *Id.* at 9.

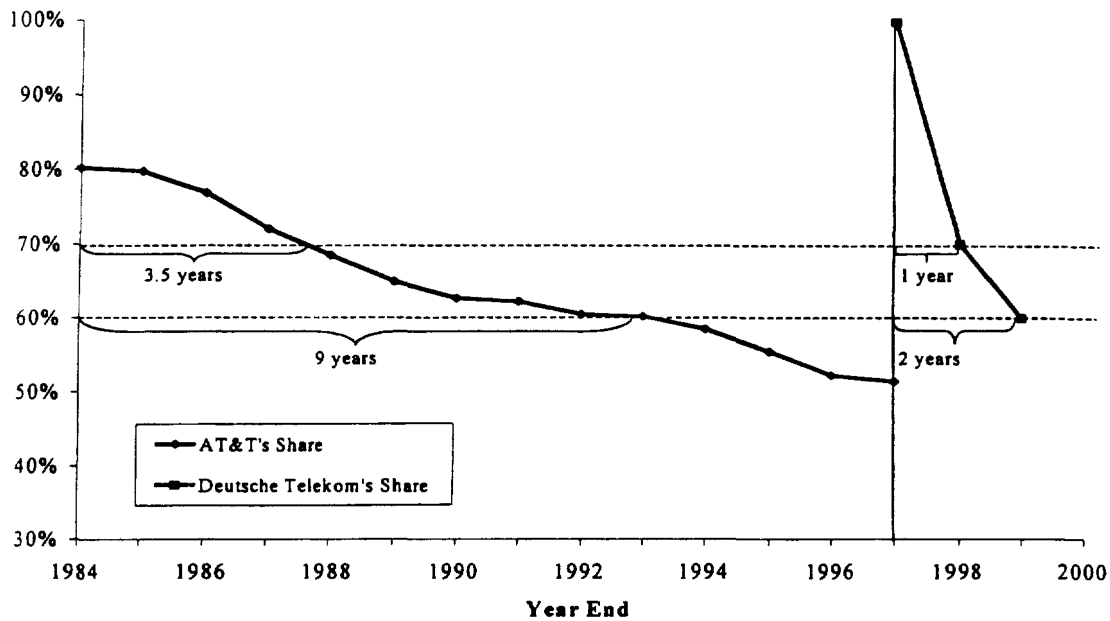
Regulation		
Interconnection	Interconnection is available. Interconnection between local carriers generally falls between 0.3 and 0.5 cents per minute. Following the FCC's access charge reform adopted in May 2000, interstate access charges dropped to 0.955 cents as of Fall 2000. A weighted average of local interconnection rates and access charges would show that current U.S. interconnection rates are approximately 0.6 cents per minute.	Interconnection has been available since January 1998. New tariffs were set by RegTP in December 1999 (24% reduction) and are among the lowest rates worldwide. Local interconnection rates average around 0.7 cents (average of peak and off-peak).
Unbundled Access to the Local Loop	Available. Best practice average of the three states with a population density most similar to Germany (NY, DE, MA) is $14.96. These prices only represent the cost for analog loops. The tariff for a digitally capable loop can be almost twice as expensive as the tariff for an analog loop.	Deutsche Telekom has been obliged to provide unbundled access to the local loop since January 1998. The price is currently set at DM 25.40 per month ($12.70 using 2 DM/$ exchange rate). In Germany, all loops are digitally capable. Thus, the price of an analog local loop in Germany is similar to an analog loop in the United States, whereas the price for a digital loop in Germany is roughly half the price of that in the United States.
Carrier Preselection	Preselection in the United States costs $5. Equal Access Recovery Fund established in the United States: Over the course of 5 years, approximately $1.3 billion was paid by the long-distance carriers to the ILECs to compensate the ILECs' network investment to facilitate carrier preselection.	Deutsche Telekom has made preselection available since January 1998. Current tariff set by RegTP: DM 10 ($5). No recovery of Deutsche Telekom's investment by competitors.
Number Portability	Available. The Telecommunications Act of 1996 allows ILECs to recover number portability costs on a "competitively neutral basis."	Available free-of-charge since January 1998. Deutsche Telekom receives no compensation for costs incurred due to a decision by the RegTP.
Third-Party Billing	Dominant carriers are not obliged to provide third-party billing. The FCC ruled that third-party billing is not a telecommunications service.	Deutsche Telekom is obliged to provide third-party billing (regulated services)
Universal Service Obligation	Provided by ILECs	Deutsche Telekom is the only carrier that is obliged to provide universal service.
Deregulation	Regulation in the long-distance market was lifted for AT&T in 1996, although AT&T still had more than 60% of the market.	Deutsche Telekom is strictly regulated in almost all market segments, although competitors gained 40% of the long-distance market.

Source: Criterion Economics, L.L.C. analysis.

Although interconnection disputes arise in Germany and produce court cases, the same is true in the United States. In the German long-distance market, as Figure 1 shows, the decline in Deutsche Telekom's market share following privatization has occurred much more rapidly than the decline in AT&T's market share occurred following its divestiture. AT&T's share of operating revenues fell from 91 percent to 45 percent during the thirteen-year period from 1984 to 1997, whereas Deutsche Telekom's market share fell from 100 percent to approximately 60 percent in only a two-year period from year-end 1997 to year-end 1999.[24]

24. INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, TRENDS IN TELEPHONE SERVICE, July 1998 (downloaded from http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend298.pdf on August 28, 2000).

FIGURE 1: DECLINE IN LONG-DISTANCE MARKET SHARE FOR AT&T AND DEUTSCHE TELEKOM



Notes: AT&T's share of total access minutes, which includes international minutes, for all U.S. long-distance carriers. Deutsche Telekom's share of domestic long-distance long distance, international, and fixed-to-mobile minutes.
Sources: INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, TRENDS IN TELEPHONE SERVICE, Table 10.1 (July 1998) (downloaded from http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend298.pdf on August 28, 2000); REGULATORY AUTHORITY FOR TELECOMMUNICATIONS AND POSTS, ANNUAL REPORT 1999, at 14 (2000); *Telekom Announces Aggressive Price Policy*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 19, 1998, at 21.

47. Indeed, most market segments of the German telecommunications market are already highly competitive and thus subject to vigorous price competition, which in itself provides an effective means of eliminating any chance of excessive pricing to earn monopoly rents. With respect to the local market, Deutsche Telekom is required to provide competitors with unbundled access to its subscriber access lines, and the Regulatory Authority has set a

monthly tariff for this unbundled access that is substantially lower than Deutsche Telekom had sought in its tariff application.

48. With respect to unbundled network access, the U.S. incumbent local exchange carriers are obliged to provide unbundled access to the local loop. The access price is set by state regulators, and thus it varies by state. Using a three-state average of states with similar population density to Germany—New York, Delaware, and Massachusetts—the monthly local loop rate is $14.96, or DM 29.92. The tariff for a digitally capable loop, however, can be almost twice as expensive as the tariff for an analog loop. By comparison, Deutsche Telekom is obliged to provide unbundled access to the local loop at DM 25.40 per month, or 15.1 percent less than the U.S. rate. Moreover, in Germany, *all* loops are digitally capable—thus, while the price of an analog loop in Germany is similar to an analog loop in the United States, the price of a digital loop in Germany is roughly *half* the price of one in the United States.

49. In the national market, the terms on which Deutsche Telekom provides services to competitors are essentially determined by the Regulatory Authority. Although the interconnection rates charged by Deutsche Telekom during 1999 were set by the Ministry for Posts and Telecommunications, the predecessor to the Regulatory Authority, in September 1997, in December 1999, the Regulatory Authority approved new interconnection rates that will apply through January 31, 2001, which are on average approximately 24 percent lower than the previously applicable interconnection rates. The terms for interconnection of Deutsche Telekom's telephone network with networks of other national providers are contained in bilateral contracts. At the end of 1999, Deutsche Telekom had signed 95 such agreements. An additional fifty companies had submitted requests for negotiations at that date. The total number of leased lines provided to carriers at year end (that is, transmission paths that are made available to

competitors in the fixed-line network) rose by 43 percent in 1999 in comparison with the previous year.[25]

50. Although Deutsche Telekom did not face significant competition in the access and local calling markets in 1999, competition in those markets is expected to increase. Various competitors have announced plans for offering local call service using unbundled local loop access, wireless local loop access, and access via power lines. The Regulatory Authority auctioned licenses for wireless local loop services in the summer of 1999. In addition, regulatory inquiries regarding the possibility of requiring further unbundling of local loop access to the local loop are in progress at the European Union level. As a result of these developments, Deutsche Telekom may face substantial competition in the local loop in the near future.[26]

51. In the German wireless market, Deutsche Telekom ranks only second behind the market leader, Vodafone. The wireless market opened earlier than the wireline market. There are four mobile network operators currently serving Germany. The two largest, T-Mobil (T-D1/T-C-Tel) and Mannesmann Mobilfunk (D2), have battled for market leadership since 1990, with D2 currently having a modest edge. Between them, T-Mobil and Mannesmann Mobilfunk serve approximately 79.9 percent of the digital mobile telecommunications market in Germany, based on management estimates, with T-Mobil having an estimated share of 39 percent of this market as of December 31, 1999. E-Plus, the third mobile network operator, entered the market using the GSM 1800 standard in 1994, two years after T-D1 and D2 commenced operations, and held an estimated 16.3 percent of the market at year-end 1999. E2, the fourth network operator, commenced operations in late 1998 using the GSM 1800 standard and currently has an estimated

25. *Id.* at 89.
26. *Id.* at 129.

market share of 3.9 percent. Licenses for UMTS—or third-generation mobile telecommunications—were auctioned in Germany during the summer of 2000. The auction generated six distinct licensees—the four incumbent wireless carriers plus two entrant carriers backed by France Télécom and by Telefonica and Sonera, respectively. Now Deutsche Telekom must compete for wireless customers against VIAG Interkom (backed by British Telecom), MobilCom Multimedia (backed by France Télécom), Mannesmann MobilFunk (Vodafone), Group 3G (a joint venture between Spain's Telefonica SA and Finland's Sonera Corp.), and KPN's E-Plus Hutchison.[27] Analysts expect that the six distinct licensees will produce "fierce competition" in the German wireless market, making "it more difficult for 3G operators to recoup their license costs."[28]

52. The large number of companies (especially from the United States) that have entered, and continue to enter, nearly all segments of the German telecommunication market ensure that prices in Germany are driven towards competitive levels. That outcome in turn ensures that Deutsche Telekom cannot earn supracompetitive returns with which to fund a predatory strategy in another country. The competitive entry witnessed in the German telecommunication market also indicates that entrants there do not fear cross-subsidization by Deutsche Telekom. Otherwise, for example, firms other than Deutsche Telekom would not have spent \$38.5 billion (\$46.2 billion total, less \$7.7 billion paid by Deutsche Telekom) in August 2000 to acquire licenses for 3G spectrum.[29] For these reasons, it is also highly improbable that,

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27. Auction results downloaded from the German Regulatory Authority for Telecommunications and Posts web site at http://umts.regtp.de/ on Aug. 21, 2000.

28. *German 3G Winners Take Hit From Credit Rating Agency S&P*, TELECOMMUNICATIONS REPORTS DAILY, Aug. 21, 2000 (quoting analysts from Standard & Poor's).

29. *German 3G Spectrum Auction Tops U.K. Bidding Total by \$10 Billion*, TELECOMMUNICATIONS REPORTS DAILY, Aug. 17, 2000 (article can be downloaded from http://www.tr.com/online/trd/2000/td081700/Td081700-01.htm)

outside Deutsche Telekom's home market, Deutsche Telekom would pose any actual risk of cross-subsidization, nor would Deutsche Telekom be believed by competitors in those other countries to pose any such risk. It bears emphasis that Deutsche Telekom has not engaged in predatory behavior in other countries where it has acquired a wireless carrier. For example, no complaints have been filed against Deutsche Telekom since it acquired One2One in the United Kingdom in August 1999.[30]

CONCLUSION

53. A simple cost-benefit analysis of Deutsche Telekom's proposed acquisition of VoiceStream and Powertel demonstrates the social welfare gains resulting from the transactions swamp any possible losses. Consumers clearly stand to gain from increased competition in the form of improved services, lower prices, or both. An invigorated VoiceStream, with access to Deutsche Telekom's technology, expertise, and resources, will provide increased competition in the provision of wireless services in the United States. The consumer welfare gains will come at the "expense" of U.S. incumbent wireless carriers as wireless prices continue to decline toward—*but not below*—average variable costs. Opponents of the merger have implied that impossible outcome by assigning predatory motives to Deutsche Telekom's acquisitions. To achieve any semblance of success, however, Deutsche Telekom would have to drive Verizon, Sprint PCS, AT&T, and Nextel out of the U.S. wireless market. Because of the increasingly competitive landscape in Germany, and because of the financial resources of its U.S. competitors, Deutsche Telekom has neither the incentive nor the ability to engage in predatory

30. Deutsche Telekom AG, *Deutsche Telekom Acquires One2One – Position in Great Britain Significantly Strengthened – Major Step on One of the Most Important Telecommunications Markets*, Company Press Release, Aug. 6, 1999.